

STATE OF CONNECTICUT

Docket No.: MMX-CV18-5010661-S	:	Superior Court
	:	
Gloria Drummer,	:	
	:	
Plaintiff, Individually and on behalf	:	
of all persons similarly situated,	:	Judicial District of
	:	Middlesex
v.	:	at Middletown
	:	
State of Connecticut, et al.,	:	
	:	
Defendants.	:	September 6, 2018

OBJECTION TO MOTION FOR PROTECTIVE ORDER

Plaintiff objects to the State’s motion for a protective order. The State’s Motion for Protective Order should be denied because Ms. Drummer clearly meets the standard for “capable of repetition, yet evading review:”

1. The challenged action by its very nature must be of a limited duration so that there is a strong likelihood that the substantial majority of cases raising a question about its validity will become moot before appellate litigation can be concluded.
2. There must be a reasonable likelihood that the question presented in the pending case will arise again in the future, and that it will affect either the same complaining party or a reasonably identifiable group for whom that party can be said to act as a surrogate.
3. The question must have some public importance.

Loisel v. Rowe, 233 Conn. 370, 382-83 (1995).

There are no set of facts and no reasonable argument that Ms. Drummer's case does not clearly meet all three requirements for capable of repetition yet evading review. The State's motion to dismiss asserts that Ms. Drummer's claims are moot because she has been discharged and is not likely to have symptoms recur and need inpatient psychiatric care again. But the second element of capable of repetition yet evading review does not depend on Ms. Drummer's status alone. The second prong requires that the "**question presented**" will arise again in the future and affect Ms. Drummer **or** a reasonably identifiable group for whom Ms. Drummer can be said to act as surrogate.

It is clear, based on the substantial, life-long, nature of Ms. Drummer's illness and the severity and duration of her symptoms resulting in the necessity of her being treated in inpatient psychiatric hospitals for the majority of her life, that it is at least reasonably likely that she may need inpatient treatment again. If that is true, her case is not moot. Even if it is not found to be true by the court, Ms. Drummer's case is not moot because the question presented: periodic reviews in compliance with *Fasulo v. Arafeh*, 173 Conn. 473 (1977) and timely discharge to the most integrated setting in accordance with the Patients' Bill of Rights and *Olmstead v. L.C.*,

527 U.S. 581 (1999); will arise again for a clearly identifiable class of patients at state psychiatric facilities.

The State's motion for a protective order is predicated on the unsupported assertion that if Ms. Drummer's individual claims are moot and not capable of repetition yet evading review, then the whole case will be dismissed. That assertion is incorrect. "[I]f the class representative's claims are moot but the class members still have live claims, courts have struggled with how to proceed, ***but in a variety of circumstances, a class representative with moot claims may proceed to represent the class in pursuit of its live claims.***" 7 Newberg on Class Actions, § 23:12, (emphasis in the original). This principle is built right into the second prong of the test for capable of repetition yet evading review. This principle was applied by the United States Supreme Court in *Sosna v. Iowa*, 419 U.S. 393, 397-403 (1975). The case involved a claim by Ms. Sosna challenging the residency requirements for divorce in Iowa. She filed the case as a class action and the state stipulated to class certification. Since she had long since met the residency requirement by the time of Supreme Court review, Justice Rehnquist, writing for the court, reviewed the status of the Court's jurisdiction and whether the case was moot. The court held that the case was not moot and that there was an ongoing case and controversy.

“The controversy may exist, however, between a named defendant and a member of the class represented by the named plaintiff, even though the claim of the named plaintiff has become moot.” *Sosna v. Iowa*, 419 U.S. 393, 402 (1975).

There are many options available in this proposed class action. First of all, the State does not argue that Ms. Drummer did not have standing and an active case and controversy with aggrievement at the time the case was filed. She could amend her complaint and claim damages pursuant to Conn. Gen. Stat. § 17a-550. The most likely outcome is that Ms. Drummer’s claims are found not moot because they are capable of repetition yet evading review. If her claims are considered moot, she should be allowed to amend her complaint to add new plaintiffs who are still in the state hospital, denied a Fasulo review, and denied timely discharge to the most integrated setting. The worst case scenario is that the case is fully dismissed, Ms. Drummer appeals, and new plaintiffs are found who file a new proposed class action, wasting court and counsels’ time and resources instead of moving this clearly ongoing and active case and controversy to merits review.

Discovery should be allowed to proceed in full pursuant to the agreed scheduling order. The proposed protective order should be denied. The

proposed systemic requests are subject to a Freedom of Information request by the Connecticut Legal Rights Project. It makes no sense to grant the State a protective order in an ongoing case when the systemic requests could be subject to a Freedom of Information request.

Conclusion

The State's request for a protective order should be denied.

Respectfully submitted,

s/Kirk W. Lowry

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Certification

I hereby certify that all the parties have consented to accept papers served electronically and that a copy of the foregoing was sent via electronic mail on September 6, 2018 to:

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s/Kirk W. Lowry
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